

04709

DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548

D. L.  
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FILE: B-190144

DATE: December 28, 1977

MATTER OF: Naval Facilities Engineering Command

DIGEST:

1. Even if Government negligently fails to insure that Miller Act bonds are filed with construction contract, unpaid supplier's remedy lies against prime contractor and not the Government.
2. Where Government completes contract work after default of prime contractor, unpaid supplier of defaulted contractor is not entitled to contract balance remaining in hands of Government for work which Government rather than defaulted contractor completed. However, unpaid supplier may have equitable claim to contract money earned by defaulted contractor but which has been retained by Government.

The Department of the Navy has requested our opinion as to whether payment may be made to an unpaid supplier of a defaulted Government contractor for material supplied to the contractor where, because the performance and payment bonds furnished by the contractor to the Navy were invalid, there is no surety from which the supplier may recover.

The record shows that on September 9, 1975, Walker Cement and Ferguson Excavating (Walker & Ferguson), a joint venture, was awarded contract N62472-75-C-6395 for repair work at the Naval Weapons Support Center, Crane, Indiana. Pursuant to the Miller Act, 40 U.S.C. § 270(a) (1970), bonds were submitted by Walker & Ferguson naming the Highlands Insurance Company (Highlands) as surety for Walker & Ferguson. By letter of May 26, 1976, Highlands advised the Navy that the bonds had been signed by an attorney-in-fact who had not been authorized to bind the surety. The Navy reports that subsequent investigation has validated that the bonds were not authorized.

On November 9, 1976, Walker & Ferguson notified the Navy that it was financially unable to complete the contract, and on December 30, 1976, the contract was terminated for default.

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The contract was then completed by Government forces stationed at Crane, Indiana. At the time of default, \$133,624 of \$160,010, the total contract price as amended, had been paid to the contractor. Of the remainder, \$7,033 constitutes contract retainage and the rest is for work unperformed and unbilled.

Wilson Building Supply, Inc. (Wilson) has made a claim against the Navy for \$17,675.93, which it asserts remains unpaid for concrete provided by Wilson and used by Walker & Ferguson in performance of the contract. Wilson alleges that the Navy was negligent in failing to detect the unauthorized Miller Act bonds and therefore should be required to pay for the concrete provided by Wilson.

Navy, on the other hand, states that there was no negligence on its part and that, in any event, the claim should be denied on the strength of Kennedy Electric, Inc. v. United States Postal Service, 367 F. Supp. 828, 833 (1973), affirmed 508 F.2d 954 (10 Cir. 1975).

We agree with the Navy. Even a negligent failure by the Government to assure that Miller Act bonds are filed does not support a laborer's or materialman's claim for payment from the Government. In Kennedy Electric, supra, the Post Office Department permitted an unbonded construction contract to proceed until the bankruptcy of the prime contractor. The plaintiff, an unpaid subcontractor, claimed payment from the Government based on its negligence. The court agreed that the Post Office had been negligent by failing to insure filing of the Miller Act bonds but held that the claim could not be allowed for that reason because of the absence of privity of contract between the plaintiff and the Government. The unpaid laborer's or materialman's remedy lies against the prime contractor and not the Government. H. Herfurth, Jr., Inc. v. United States, 89 Ct. Cl. 122 (1939).

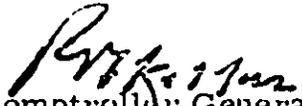
Wilson notes, however, that in this case some \$10,400 of the \$26,000 unpaid contract price is to be used for completion of the contract work by station forces at Crane. In Wilson's view, this amount, from "an equitable standpoint," should be paid to the unpaid supplier which relied on the contract bonds rather than transferred "from one of [Navy's] pockets to another while utilizing the materials furnished by [Wilson] without payment for same." Otherwise, Wilson believes, the Navy will be unjustly enriched at the expense of the supplier.

We do not agree with Wilson's reasoning. As Navy reports, the defaulted contractor has been paid \$133,624 for the portion of the work which it completed. Of the remaining contract balance

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of \$26,386 (contract price of \$160,010 less \$133,624 paid to contractor), only \$7,033 is traceable to contract retainage, i. e., money earned by the contractor but retained by the Government to assure contract performance. Thus the defaulted contractor earned a total of \$140,657 while the remaining contract work was completed by the Government (apparently at a cost of \$18,400). We see no reason in law or equity why the Government should be obligated to pay the contractor's supplier for the portion of the work which was completed by the Government at its own expense. We do not think that the Government is unjustly enriched if it retains the contract amount which was not earned by the defaulted contractor.

We recognize, however, that Wilson may have an equitable claim to the contract retainage of \$7,033. See Peariman v. Reliance Insurance, 371 U. S. 132 (1962); Kennedy Electric, supra. In Kennedy the court held that the unpaid subcontractor had an equitable lien on the retainage held by the Postal Service. In this regard, the Navy indicates that there may be other unpaid suppliers and subcontractors under this contract in addition to Wilson. Therefore, we recommend that the Navy take steps to assure that the rights of all parties are adequately determined prior to any payment from the contract retainage.

  
Acting Comptroller General  
of the United States